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Supreme Court, U.S.
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No. 04-450

IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL
FOR THE FIRST CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

A. This Court should determine whether the Confrontation Clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing otherwise inadmissible evidence at trial. 1

B. This Court should determine whether a police informant's out-of-court testimony constitutes "testimonial" evidence and thus, under *Crawford,* is subject to Confrontation Clause scrutiny. 4

C. Even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider whether the Confrontation Clause imposes an absolute bar to police informant testimony absent a prior opportunity for cross examination. .. 5

D. This Court should consider whether an alleged co-conspirator's statement, which is premised solely on a hearsay foundation and is so inherently suspect, is nevertheless admissible without cross-examination simply because it might satisfy Code of Evidence article 803(D)(3)(b). 7

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Cases: *Page*

Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) 9

Bourjaily v. United States, 781 F.2d 539 (6th Cir. 1986) 9

Crawford v. Washington, 124 S. Ct. 1354 (2004) ....*passim*

Satterwhite v. Texas, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) 2, 5

Federal Constitutional Provisions:

U.S. Const. amend. V 1

U.S. Const. amend. VI (Confrontation Clause) ... 1, 2, 7

Statute:

La. Code of Evidence Art. 801(D)(3)(b) 7

The State's legal arguments suggest that this case involves a conspiracy conviction. The State never tried Mr. Tsolainos for allegedly conspiring to kill his ex-wife by hiring a hit man and in fact dropped those charges. The State rather tried Mr. Tsolainos for second degree murder when Mrs. Tsolainos tragically died in a car accident while Mr. Tsolainos was driving.[1] The State's entire case of proving Mr. Tsolainos had the requisite intent to kill Mrs. Tsolainos in the car accident consisted of the alleged conspiracy to hire a hit man. Without the alleged conspiracy, the State had no second degree murder case. Mr. Tsolainos however could not confront the alleged conspiracy presented against him, which included the out-of-court statements of three witnesses, because those witnesses either pled the Fifth Amendment or committed suicide before trial. This case presents the opportunity for this Court to consider several critical issues under the Confrontation Clause of the Sixth Amendment.

A. This Court should determine whether the Confrontation Clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing otherwise inadmissible evidence at trial.

Contrary to the State's argument, Melissa's statement was clearly in controversy at the state court level and this Court does have jurisdiction to consider it. Petitioner objected at the pre-trial hearing to the introduction of all of the out-of-court conspiracy evidence, including Melissa's statement, and sought immediate review of the trial court's adverse ruling to both the court of appeal and the Louisiana Supreme Court. Although the State later chose not to introduce Melissa's statement directly at trial, and so Mr. Tsolainos could not lodge an objection specifically to it, Mr. Tsolainos objected at trial to

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1. Mr. Tsolainos presented uncontroverted scientific evidence at trial that this was an accident. The State's own forensic expert also testified that Mrs. Tsolainos had no physical signs of being hit in the abdomen by the car, as the State contended, and that she had been drinking on the day in question. Mrs. Tsolainos also called Mr. Tsolainos to come to the house on the day in question to pick up the belongings. And, while the State relied heavily on the testimony of Clarissa Tsolainos and George DeForest, Clarissa admitted in a new trial hearing that she lied at trial and offered Mr. DeForest $20,000 or a new truck for his testimony.

the introduction of all of the other conspiracy evidence. Mr. Tsolainos also appealed the trial court's admission at trial of all of the submitted conspiracy evidence which was only admissible because of the foundation laid at the pre-trial hearing, which included Melissa's statement.[2] This issue is clearly ripe for consideration by this Court.

Turning to the merits of the State's arguments, the State asserts that because it did not introduce Melissa's statement at trial but allowed Det. Juge to refer to it does not implicate Mr. Tsolainos' Sixth Amendment right. The State omits however that Det. Juge also testified that he relied on that statement in arresting Mr. Tsolainos. The clear implication of Det. Juge's testimony was to associate Mr. Tsolainos with the alleged conspiracy through Melissa's statement. His testimony therefore had the same effect as introducing Melissa's statement to say Mr. Tsolainos was involved in the conspiracy. Mr. Tsolainos was clearly denied his Constitutional right to cross-examine that testimonial evidence because Melissa was unavailable at trial.

Should this Court find that Mr. Tsolainos was denied his right to cross-examine Melissa at trial, the State's back-up argument is that Constitutional violation was harmless error in light of the other evidence at trial, namely Mr. Tsolainos' statement. Because of the fundamental nature of this Sixth Amendment right as discussed in *Crawford* and the unpredictability of applying an amorphous test to excuse adherence to that right, *Crawford* raises (or re-raises) the question as to whether any violation of this Sixth Amendment right can ever be considered harmless, particularly when that evaluation is based on yet another equally amorphous standard. Even if harmless error applies, that standard is not whether the other evidence submitted is sufficient to support the verdict. *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988). The proper analysis is whether the State has proved beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* First and foremost, the State repeatedly referred to Melissa as a co-conspirator (at trial and in its brief here) although the totality

2. *See* Mr. Tsolainos' Petition for Writ of Certiorari, pp. 11-14.

of the evidence showed that she was never one. Additionally, while the State attempts to ameliorate the admission of Melissa's statement with Mr. Tsolainos' statement, Mr. Tsolainos only admitted to speaking to Mr. Branigan but denied pursuing anything further.[3] The remainder of the alleged conspiracy evidence was the out-of-court statements of the three witnesses. Moreover, the State did not use this evidence for the purpose of proving the alleged conspiracy, which, by any logical measure, was discontinued (if it ever existed) with the arrests of Mr. Branigan, Mr. Tsolainos and Melissa. The State rather offered that evidence to prove Mr. Tsolainos' state of mind three weeks after the arrest with respect to a death which bore no similarity to the alleged conspiracy, and Mr. Tsolainos was precluded from confronting those witnesses, including Melissa, on that issue. Whether harmless error even applies, much less exists, here is highly questionable. This Court ought to consider those issues or at a minimum remand this case to the lower court for those determinations.

To the extent Det. Juge's reference to Melissa's statement at trial, rather than the actual admission of her statement, would not violate Mr. Tsolainos' Sixth Amendment right under *Crawford*, Mr. Tsolainos also urged this Court to consider whether *Crawford* extends to testimonial evidence admitted at pre-trial hearings. The State's only response to this issue is that hearsay has been accepted before in pre-trial hearings. The State's response begs the question. Prior to *Crawford*, trial practice also permitted the introduction of testimonial hearsay evidence without cross-examination. This Court changed that in *Crawford*. The State provides no argument at all on whether *Crawford* also changes, or should change, pre-trial practice as it previously existed. For all of the reasons set forth in Mr. Tsolainos' Petition, this Court should consider this issue.

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3. Mr. Tsolainos also never stated that Melissa introduced him to Mr. Branigan for the purpose of hiring a hit man, as the State asserts. He was introduced to Mr. Branigan (a drug dealer) when, at a very difficult time in Mr. Tsolainos' life, he unfortunately lapsed into drug use, and contrary to the State's assertion, the State did introduce Mr. Tsolainos' prior drug use at trial, over defense objection which was supported by the State's own expert's opinion that it was irrelevant.

B. This Court should determine whether a police informant's out-of-court testimony constitutes "testimonial" evidence and thus, under *Crawford*, is subject to Confrontation Clause scrutiny.

The State's contention that Mr. Schmolke's out-of-court testimony does not constitute "testimonial" evidence is based on two faulty premises. First, while the State admits that Mr. Schmolke was a police informant, the State characterizes him as a co-conspirator. Mr. Schmolke was clearly not a co-conspirator. There is absolutely no evidence in the record that Mr. Schmolke ever agreed to participate in the alleged conspiracy even before contacting the police. Moreover, at the time of the recording, he was clearly working with and at the direction of the police. Notably, the trial court did not admit Mr. Schmolke's out-of-court testimony at trial on the basis that he was a co-conspirator, and the court of appeal specifically stated that Mr. Schmolke was not a co-conspirator.[4] To the extent the State is arguing that a police informant nevertheless qualifies as a co-conspirator, that imaginative issue itself should warrant this Court's review of this case.

Second, the State submits that the recorded conversation between Mr. Schmolke and Mr. Branigan must be analyzed as a whole without isolating each side of the conversation. The State surely is not advocating that as long as one individual's statements in a conversation are non-testimonial evidence (or admissible under a hearsay exception) the statements of the other party to the conversation automatically are classified the same. The State of course provides no legal support for that position although it interchangeably discusses Mr. Schmolke's and Mr. Branigan's statements in the taped conversation. The focus here is on Mr. Schmolke's statements, not on Mr. Branigan's (which are discussed below). If it is the State's position that Mr. Schmolke's statements are automatically non-testimonial and admissible because Mr. Branigan's (arguably) are, that imaginative issue also should warrant this Court's review of this case. The State however is likely arguing in support of the trial court's ruling which admitted

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4. *See* Mr. Tsolainos' Petition for Writ of Certiorari, p. 13, n. 21.

Mr. Schmolke's statements on the basis that it was not hearsay because it was not offered to prove its truth but only to put Mr. Branigan's statements in context. The error in that argument is the basis on which Mr. Schmolke's statements were admitted is irrelevant. The question presented is whether they constitute "testimonial" evidence and thus, under *Crawford*, cannot be admitted for any reason without cross-examination.

Once the State's faulty premises are laid bare, the State does not address that issue at all. For all of the reasons set forth in Petitioner's Petition, this Court should consider that issue.

C. Even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider whether the Confrontation Clause imposes an absolute bar to police informant testimony absent a prior opportunity for cross examination.

The State again does not address this issue at all but reverts to its erroneous premises that Mr. Schmolke was a co-conspirator and that Mr. Schmolke's statements cannot be considered separately from Mr. Branigan's. Again, should the State be advocating for two imaginative theories of law here, this Court should grant this writ application to consider those issues as well.

The only possible argument which might otherwise be deciphered from the State's brief is that Mr. Schmolke's statements were reliable and thus properly admitted. While that conclusion is subject to serious dispute (as discussed below), it misses the point. In *Crawford*, this Court was concerned with the process for assessing reliability:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."

Id. at 1370.

The State here does not address why the Framers nevertheless meant to leave the Sixth Amendment protection of *non-testimonial* evidence to those misgivings. The State also

ignores the multiple, different reasons that the trial court (at the pre-trial hearing and at the trial) and the appellate court provided for admitting Mr. Schmolke's statements, which similarly existed in *Crawford* and underscored this Court's revelation: "*Roberts*' failings were on full display in the proceedings below." *Id.* at 1372. The State instead focuses solely on justifying the lower courts' decisions, even though this Court concluded in *Crawford* that neither the "vagaries of the rules of evidence" nor the "amorphous notions of 'reliability'" is the controlling standard:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 1370.

This Court further recognized in *Crawford* that the use of a reliability balancing test not only was so unpredictable but also resulted in the admission of testimony the Confrontation Clause clearly intended to exclude. *Id.* at 1371-72. Applying such a balancing test in this case exposes the same amorphous, if not entirely subjective, notions of reliability, even while the State advocates that Mr. Schmolke's statements were properly admissible because they were reliable. As previously noted in Mr. Tsolainos' Petition, the evidence presented on Mr. Schmolke's reliability (or lack thereof), particularly from the State's own police officer, was uncontroverted and overwhelming.[5] For obvious reasons, the State therefore attempts to shift the focus from Mr. Schmolke, although his statements are at issue, and asserts that Mr. Tsolainos fails to point out that Mr. Branigan was in fact convicted of conspiracy. Equally compelling however, which the State ignores, is that Melissa was in fact found not guilty of those same charges. The State

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5. Mr. Tsolainos' Petition for Writ of Certiorari, pp. 22-23.

also attempts to bolster Mr. Schmolke's reliability by asserting that Mr. Tsolainos' statement alone supported the existence of a conspiracy between Mr. Tsolainos and Mr. Branigan and the recorded conversation between Mr. Branigan and Mr. Schmolke verified the conspiracy and presented affirmative acts in furtherance of it. As noted above, Mr. Tsolainos only admitted in his statement to speaking to Mr. Branigan and denied pursuing anything further. Nowhere in Mr. Tsolainos' statement does he discuss Mr. Branigan's solicitation of Mr. Schmolke nor was he a party to the tape recorded conversation between those individuals. Yet, the State used the recorded conversation as evidence of a conspiracy, including highly prejudicial comments attributed to Mr. Tsolainos, although that conversation went far beyond his statement and Mr. Tsolainos could not cross-examine Mr. Schmolke. Mr. Schmolke's statements were also not even used to prove the alleged conspiracy but were used for a completely different purpose on a completely different charge. Thus, this case presents serious questions about courts' individualized applications of a "reliability" exception to the Confrontation Clause, even as to non-testimonial evidence from a police informant, and provides this Court with the opportunity to consider whether that exception or the general rules of evidence should continue to govern that evidence.

D. This Court should consider whether an alleged co-conspirator's statement, which is premised solely on a hearsay foundation and is so inherently suspect, is nevertheless admissible without cross-examination simply because it might satisfy Code of Evidence article 803(D)(3)(b).

The State asserts that this Court held in *Crawford* that a co-conspirator's statement is not testimonial and thus is not subject to the Sixth Amendment's Confrontation Clause. The State also asserts that Mr. Tsolainos is asking this Court to apply a reliability test to a co-conspirator's statement after it is determined to be admissible as a firmly rooted hearsay exception. The State misunderstands both *Crawford* and Mr. Tsolainos' argument.

While Mr. Branigan's statement might be non-testimonial evidence, this Court did not hold that non-testimonial evidence is not subject to the Sixth Amendment. This Court only adopted an absolute bar to the admission of testimonial evidence, absent cross-examination, and specifically left open applying the Confrontation Clause to non-testimonial evidence. *Crawford*, 124 S. Ct. at 1370. Mr. Tsolainos also is not advocating imposing a reliability test after a hearsay statement is determined to be a co-conspirator's statement. Mr. Tsolainos rather was advancing the issue left open by this Court in *Crawford* where this Court's suggested that hearsay law might govern the admissibility of non-testimonial evidence because it inherently incorporates a reliability standard, at least with respect to "firmly rooted hearsay exceptions." This case raises the question as to whether the inherent presumption of reliability incorporated into the co-conspirator's exception to the hearsay rule exists here, considering the inherently unreliable nature of the out-of-court testimony, including Mr. Branigan's. And therefore, should this Court adopt an absolute bar to the admissibility of co-conspirator's statements absent a prior opportunity for cross-examination to avoid either, or both, "core confrontation violations" from occurring with the admissibility of inherently unreliable co-conspirator's statements or imposing a reliability standard on the admissibility of such statements which will also likely result in "amorphous, if not entirely subjective" determinations of reliability. Other than the conclusory retort that this Court should continue the jurisprudence that a co-conspirator's statement is sufficiently reliable, the State does not address these questions at all.

On the issues relating to the State's foundation for the alleged conspiracy, the State incorrectly asserts that Mr. Tsolainos claims that the State's evidence was dependent entirely on the hearsay conversation of Mr. Schmolke and Mr. Branigan. After which, the State then states that Mr. Tsolainos' statement corroborates Mr. Branigan's assertions to Mr. Schmolke that Mr. Tsolainos solicited him to kill his ex-wife.

Mr. Tsolainos clearly acknowledged that the alleged conspiracy evidence included not only Mr. Schmolke's and

Mr. Branigan's taped conversation but also Mr. Schmolke's comments to Det. Scallan, and Melissa's and Mr. Tsolainos' statements to the police.[6] Where Mr. Tsolainos and the State agree however is that Mr. Tsolainos' statement could only show, at best, the "agreement" stage necessary to establish a *prima facie* case of conspiracy. Thus, the only evidence to support the required "overt act" stage was the hearsay testimony. While this Court in *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) permitted the use of hearsay statements, this Court (contrary to the State's implication) specifically did not hold that hearsay evidence alone can provide the basis for proving a necessary stage for a *prima facie* case, without which a *prima facie* case does not exist. *Id.* at 181, 107 S. Ct. at 2781. Also contrary to the State's assertion that, like *Bourjaily*, Mr. Schmolke's and Mr. Branigan's statements were verified by other events, *Bourjaily* did not involve hearsay statements that were verified by other hearsay statements. In *Bourjaily*, the FBI informant who was part of the tape recorded conversation with the defendant's alleged co-conspirator and witnessed the meeting between the defendant and the alleged co-conspirator testified at trial and was subject to cross-examination there. *Bourjaily*, 781 F.2d 539, 541 (6th Cir. 1986). Here, neither Mr. Schmolke nor Mr. Branigan testified at trial and their statements could only be "verified" by each other's or by other hearsay evidence (such as Det. Scallan's repeating their conversation) because Mr. Branigan's solicitation of Mr. Schmolke is nowhere in Mr. Tsolainos' statement. Additionally, Mr. Schmolke's and Mr. Branigan's taped conversation contained several inaudible sections, the contents of which Mr. Tsolainos was precluded from ascertaining (and perhaps contained exculpatory evidence) because neither of those individuals could be cross-examined.[7]

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6. Mr. Tsolainos' Petition for Writ of Certiorari, p. 24.

7. Mr. Tsolainos was also deprived of ascertaining whether Mr. Schmolke and Mr. Branigan had any off-tape conversations, including whether they planned to create the incriminating tape against Mr. Tsolainos. For example, Det. Scallan testified Mr. Schmolke would be paid for results; what is more incriminating than this taped statement which is not subject to cross-examination?

Moreover, the State completely ignores this Court's cited decisions which provide that hearsay evidence must be reliable by virtue of its own trustworthiness, not by reference to other evidence at trial.[8] Thus, the issues of whether hearsay alone can establish a *prima facie* case of conspiracy and whether hearsay can be bootstrapped onto other evidence, especially other hearsay evidence, to establish its reliability are ripe for consideration by this Court.

CONCLUSION

This Petition for Writ of Certiorari should be granted. As an alternative to plenary review, this Petition should be granted, the judgment of the Louisiana Court of Appeal for the First Circuit vacated and this case remanded to that court for further consideration in light of *Crawford*.

Respectfully submitted,

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8. Mr. Tsolainos' Petition for Writ of Certiorari, p. 26.